No. 2[illegible] 11

In the United States Circuit Court of Appeals

for the

Ninth Circuit

SOCIETE NOUVELLE D'ARMEMENT,
Plaintiff in Error,

vs.

J. R. BARNABY,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANT IN ERROR,

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653 Colman Building,
Seattle, Washington.

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BRIEF OF DEFENDANT IN ERROR,

STATEMENT OF THE CASE.

This is an action at law.

The complaint alleges that between certain dates the plaintiff rendered services to defendant at its special instance and request in writing. (Tr. ecord p. 1)

The Answer contained a general denial and two affirmative defenses, one of former recovery;

the other, pleading the statutes of limitation. (Tr. Record pp. 3, 4.)

The trial was to the court under a written stipulation between the parties waiving a jury. (Tr. Record p. 6.)

In his opening statement, counsel for plaintiff stated that plaintiff relied upon certain letters as evidencing the contract of employment but containing no direct promise of compensation for the services and mentioning no sum agreed to be paid plaintiff and that evidence would be offered of the reasonable value of the services rendered. (Tr. Record pp. 23, 24.)

Thereupon counsel for defendant objected to the introduction of any evidence in support of the complaint, for the reason that it was apparent from the record that the action was barred by the statute of limitation of the state of Washington. (Tr. Record p. 24.)

The court declined to rule at that time, reserving the question for consideration on final argument; and thereupon it was agreed between counsel in open court that all of the plaintiff's evidence should go in subject to this objection, and that the defendant should not waive it by offering testimony on its own behalf. *Id.*

At the close of the plaintiff's case in chief, defendant proceeded to put in its case without the intervention of any motion or any request on its part for a declaration of law.

At the close of all the testimony both parties rested; whereupon, upon oral argument, plaintiff's counsel contended that under all the evidence in the case plaintiff was entitled to judgment; and defendant's counsel contended (a) that his objections to the admission of any evidence in support of the complaint must be sustained, and (b) the evidence stricken, and further (c) that in any event under all the evidence in the case defendant was entitled to judgment.

Thereupon the cause was taken under advisement by the court. (Tr. Record p. 65.)

Thereafter the court made a general finding in favor of the plaintiff in the sum of $4,000 and interest, and judgment was rendered agreeably to the general finding, the judgment reciting, among other things, as follows:

"the parties having joined in a request for special findings and that neither party having served his draft findings or delivered the same to the clerk of the court for the presiding judge at said trial, and the time within which the defendant as the losing party has under the Rules of this court to serve its draft findings and deliver the same to the clerk for the presiding judge at said trial hav-

ing expired and the plaintiff having in open court waived his right to special findings and the court having found the issue for the plaintiff in the sum of'' etc. (Tr. Record p. 15.)

Thereafter a bill of exceptions was duly settled and certified by the trial judge and ordered filed. (Tr. Record pp. 23-26.)

Thereafter, defendant as plaintiff in error petitioned for an order allowing a writ of error and fixing the amount of the supersedeas and an order was duly entered allowing the writ of error and fixing the amount of the supersedeas. (Tr. Record pp. 21, 22.)

An assignment of Errors was duly filed simultaneously with the petition for writ of error. (Tr. Record pp. 66-71.)

ARGUMENT.

POINT I.

Only exceptions to rulings of the trial court, made at the time at the trial and duly presented in the Bill of Exceptions, can be considered by this court on review.

The finding of fact by the court being general, the review by this court can only extend to rulings of the trial court in the progress of the trial and

then only when excepted to at the time and duly presented by a bill of exceptions.

R. S. U. S. Sec. 700.

Kelly v. Ophir H. C. Mg. Co., 169 Fed. 598.

Marinette Sawmill Co. v. Scofield, 174 Fed. 562.

Webb v. Nat. Bank, 146 Fed. 718.

Streeter v. Sanitary Dist., 133 Fed. 127.

Paul v. Deleware, etc. Co., 130 Fed. 951.

The statement of the court in its opinion on the merits as to the effect of the evidence does not fall within "rulings" as contained in the R. S. U. S. sec. 700.

Moser v. Smith, 191 Fed. 502.

Keely v. Ophir, etc. Co., supra.

Streeter v. Sanitary Dist., supra.

Bell v. R. R. Co., 194 Fed. 366.

Steinhauser v. Order St. Benedict, 194 Fed 289.

The assignments of plaintiff in error that there is no evidence to support the judgment being a

question of law cannot be reviewed here unless presented to, and passed on by, the trial court by some appropriate action during the trial, unless the finding is entirely without any evidence to support it.

Steinhauser v. Order St. Benedict, supra.

It is true that the plaintiff in error had an exception to the general finding of the trial court incorporated in that finding; but an exception to the general finding by the court for the plaintiff, upon the evidence adduced at the trial, not raised or presented in the Bill of Exceptions, presents no question of law which the appellate court can review.

Town of Martinton v. Fairbanks, 112 U. S. 670

Phoenix Securities Co. v. Dittmar, 224 Fed. 893, 9th C. C. A.

This rule, so thoroughly established and followed, disposes of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Assignments of Error, for none of these assignments is based upon an exception to a ruling of the court during the trial, excepted to at the time and duly presented in the Bill of Exceptions.

Assignments of Error, 8th to the 18th inclusive, are based upon rulings of the court in the progress of the trial, excepted to at the time and duly presented in the Bill of Exceptions.

We will answer the argument of counsel for plaintiff in error in support of his contentions in the order in which they appear in his opening brief.

POINT II.

Fourth Assignment of Error.

Alleged error in overruling the objection of defendant to reception or introduction of any evidence to support the plaintiff's complaint. (Tr. Record p. 66. Plaintiff in Error's Brief p. 9.)

There was no ruling by the trial court on this objection; the objection was made at the close of the opening statement of plaintiff and ruling thereon reserved; at the close of the testimony defendant renewed his objection, and that objection together with the case on its merits was taken under advisement by the court. Nor was there, either at the close of plaintiff's case or at the close of the testimony, any exception taken at the time by defendant for failure of the court to rule on the objection; and no exception is presented in the Bill of Exceptions, covering the objection set out in the 4th Assignment of Error.

That the court finally disposed of this objection adversely to defendant is manifest by the general finding in favor of plaintiff; and in that general finding is written the exception of defendant

thereto; but no exception thereto is raised and presented in the Bill of Exceptions for review by this court; and, as we have seen under the First Point, an error urged, not presented in the Bill of Exceptions, cannot be reviewed by this court.

Should the court not take this view of the law governing review on writ of error, we submit as a further answer to contention of plaintiff in error:

The theory of plaintiff in error in respect of the 4th Assignment of Error is: That the complaint alleges plaintiff rendered services between October 29, 1910 and June 6, 1912; at defendant's special instance and request in writing, which writing, consisting of letters, counsel admitted in his opening statement at the trial, contained no express promise of compensation for the services and mentioned no sum agreed upon to be paid plaintiff and stated that evidence would be offered of the reasonable value of the services so rendered; that in such case, nothing appearing in the contract sued upon as to price or compensation, which was an essential element of the contract, resort must be had to oral testimony; and thus the contract would be in part oral and in part written and therefore an oral contract, on which the statutes of limitation of the state of Washington would run as follows:

"Upon a contract or liability express or implied, which is not in writing and does not arise

out of any written instrument," three years. Sec. 159 Remington's 1915 Washington Code, subd. 3.

But the statutes of limitation of Washington further provide that "an action upon a contract in writing or liability express or implied arising out of a written agreement," may be commenced within six years. Sec. 157, subd. 2, Remington's 1915 Washington Code.

Subd. 2 of Sec. 157 has been construed by the Supreme Court of the State of Washington in *Caldwell v. Hurley,* 41 Wash. 296, where the court said:

"said subdivision 2 * * * differs from the statutes of limitation of most if not all the other states. In fact, after a painstaking research we have found no similar statute. The peculiar feature of our statute is that an implied liability arising out of a written instrument is included in the same clause with an express liability arising out of a written contract. The legislature evidently thereby intended that a certain class of actions should be included within the terms of said section which had not in other states been associated or connected with actions on written instruments or actions founded upon written agreements."

This brings the cause of action in the case at bar within subd. 2 of Sec. 157, *supra,* providing a limit of six years for the commencement of suit.

Nor do we consider the cas of *Ingalls v. Angell,* 76 Wash. 692, cited in Brief of plaintiff in error, p. 12, overrules *Caldwell v. Hurley, supra.* In *Ingalls v. Angell, supra,* the court in discussing the question of limitation said:

"The first question to be determined is whether the six-year or the three-year statute of limitation applies to the contract as pleaded. An action upon a contract in writing, or liability express or implied, arising out of a written *contract,* may be begun within a period of six years." (Italics ours). But the language thus referred to is not the language of the statute. The statute provides:

"An action upon a *contract* in writing, or liability express or implied, arising out of a written *agreement,*" may be commenced within six years (Italics ours).

Furthermore, an examination of the case itself, discloses that the opinion so far as it relates to limitation of the action is dictum for the court found the cause of action in fact accrued within three years.

In view of the peculiarity of the statutes of limitation of the state of Washington and the statement by the Supreme Court of that state that no similar statute could be found after a painstaking research, a review of the cases from other states, cited by plaintiff in error in its brief in discussing

the 4th Assignment of Error, will in our opinion, not be illuminating.

POINT III.

Fifth Assignment of Error.

That the evidence upon the trial shows that plaintiff's cause of action was barred at the time of the commencement of the action by the statutes of limitation of the state of Washington. (Tr. Record p. 66. Plaintiff in Error's Brief, p. 14.)

Neither at the close of plaintiff's case nor at the close of all the testimony, was there any ruling by the court, excepted to by defendant upon a motion for judgment or a challenge to the sufficiency of the evidence or a request for a declaration of law, which fairly presented the issue of law raised by the 5th Assignment of Error, as to whether or not, on the pliaintiff's case or on all of the testimony, a judgment could be sustained in favor of plaintiff; and no exception is presented in the Bill of Exceptions to any ruling of the court or failure of the court to rule, based on the legal proposition that the evidence of the case shows that the statute had run, at the time of the commencement of this action.

The 5th Assignment of Error cannot be reviewed if we are right in our statement of the law in our First Point.

Should the court not take this view, then we submit:

That the statutes of limitation were pleaded as an affirmative defense by defendenat. (Tr. Record p. 4); and denied by plaintiff's reply (Tr. Record p. 5.)

The running of the statute was thus an issue raised by the pleadings and that issue was decided in favor of plaintiff by the general finding.

Further, the complaint alleges that defendant maintained a general agency at Seattle during three years last past, i. e. immediately preceding the commencement of the action. Captain Jolivet for defendant testified at the trial, in July 1916, that he had been agent for three years. (Tr. Record p. 55.) Plaintiff in Error admits in its opening brief "that Jolivet succeeded defendant in error" in such agency (p. 13, lines 6-8.)

And it appears from the testimony contained in the Bill of Exceptions, if the evidence is to be considered by this court in reviewing this 5th Assignment of Error, that plaintiff testified that he had been agent of defendant at Seattle continuously up to about the time this difficulty arose early in 1912, to about April 1912. (Tr. Record p. 56.)

All of which amounts to this: That plaintiff's agency and that of Jolivet extended back more than

three years prior to the commencement of this action.

After the defendant had closed its testimony, it thereupon rested "with the understanding that the amendment of the complaint in the case at bar to read 'ship's agent' should not alter the force and effect of the judgment of the Superior Court as a bar, if it be otherwise a bar, that the term 'ship's broker' (in the complaint in the former suit) should be considered by the court to mean the same as ship's agent." This was conceded by the plaintiff. (Bill of Exceptions, Tr. Record p. 56.)

Counsel for plaintiff in error, at page 13 of his brief, referring to the testimony of Captain Jolivet, given at the time of the trial, July 1916, in the case at bar, that he had acted as agent for plaintiff in error for three years, argues: "For aught that appears he might have been agent of the plaintiff in error for three years and ten or eleven months. It is admitted that Captain Jolivet succeeded the defendant in error."

That is to say that Captain Jolivet, in using the words "three years" meant "three years, more or less."

And if it can be considered that Captain Jolivet meant three years more or less, it might be *less* quite as well as more. In which case, the apparent hiatus between the agency of defendant in error and

of Captain Jolivet is closed up by the allegation of the complaint and the finding of fact, in the former suit, that the plaintiff rendered services as ship's broker (that is: ship's agent) between November 12, 1909 and January 5, 1914. (Plaintiff in Error's Exhibit "A". Plaintiff in Error's Brief p. 15.)

But during plaintiff's agency, the statutes of limitation were suspended as to this action of plaintiff against defendant.

Where service of process is made upon an officer or agent who, although within the terms of the statute, sustains such relation to plaintiff or the claim in suit as to make it to his interest to suppress the fact of service, such service is unauthorized.

32 Cyc. 554.

People v. Lafferty, 96 N. E. 1052.

Service of process will not be sustained where it is upon a person who is a party plaintiff.

111 Ills. 32.

103 Ills. 472.

It is not sufficient service of a writ against a corporation to serve the same upon the plaintiff, as president of the corporation.

Buch v. Mfg. Co., 4 Allen (Mass.) 357.

It would not have availed plaintiff to have assigned his claim for the purpose of having action brought on such assigned claim by service of process in such action upon plaintiff, as agent for defendant.

In an action against a corporation on an assigned claim for personal services, service of process on the assignor, as an officer of the corporation, was held invalid.

Atwood v. Power Co., 111 N. W. (Mich.) 747.

One interested in the recovery of a loss on a fire insurance policy cannot be considered the Company's agent so that citation served upon him as such agent will bind the Company.

No. Br. & M. Ins. Co., v. Storms, 24 S. W. (Tex.) 1122.

The case of *Schubach v. Redelsheimer's Executors,* 158 Pac. 739 (Wash.) cited by plaintiff in error in discussing its 5th Assignment of Error, Brief p. 15, does not support its contention that defendant in error could have assigned his claim and that in an action by his assignee, service of summons could have been made upon plaintiff in error by serving defendant in error, as agent. That was a case of an executor, whose claim against the estate having been presented and rejected by his co-executor, assigning his claim to a third party who brought an action upon the assigned claim against both executors, and the court said:

"When Moyses (one of the executors) presented his claim to his co-executor, he did so as a claimant against the estate. It was not as if he had been sole executor. His co-executor could pass on the claim as fully as if she were the sole executrix and he a claimant merely."

No inference can be drawn from the language of the court that, if Moyses had been sole executor, he could have assigned his claim and such assignee could have either presented the assigned claim for allowance by Moyses as executor; or after rejection could have commenced action on the assigned claim against Moyses as executor and acquired jurisdiction by service of summons on Moyses, as executor. The statutes of the state of Washington provide, that where the executor or administrator is himself a creditor of the testator or intestate, his claim shall be presented for allowance or rejection to the judge of the court. Sec. 1487, Remington's 1915 Code of Washington.

This suspension of the statute of limitation in the instance case continued until Jolivet succeeded plaintiff as defendant's agent in July 1913 and three years had not run after the apopintment of Jolivet and before the commencement of the action in February 1916.

Assuming, but not admitting, that plaintiff's cause of action was upon a contract or liability, express of implied, which was not in writing, and did

not arise out of a written instrument, which would toll the statute in three years, still the action was not barred by the statute, because of the suspension of the running of the statute during plaintiff's agency.

For Sec. 168 of Remington's 1915 Washington Code provides that if the cause of action shall accrue against any person who shall be out of the state * * * such action may be commenced within the terms therein respectively limited, after the return of such person into the state.

For the purpose of an action on plaintiff's claim against defendant, the defendant is to be considered as withdrawn from the state during plaintiff's agency.

POINT IV.

6th and 7th Assignments of Errors.

(a) That the evidence shows that the cause of action in plaintiff's complaint was merged in and barred by a judgment in a former suit in the state court.

(b) That the evidence shows that plaintiff recovered or ought to have recovered or would in law recover all of his demands against defendant for which he has herein sued, in the former action in the state court. (Tr. Record p. 67. Pltt. in Error's Brief p. 15.)

There was on the part of defendant, at the trial, no motion for judgment or a request for a declaration of law or any other action which fairly presented to the court the issue of law whether or not the action herein was barred by a former recovery.

There was no ruling of the court on any such issue of law, no exception therefor, to such ruling, or for a failure to make such ruling, and no such exception is presented by the Bill of Exceptions, respecting the matters included in the 6th or 7th Assignment of Errors. For reasons given in our First Point the 6th and 7th Assignment of Erorrs cannot be reviewed by this court.

Should the court not take this view of the law, we submit:

That the bar of a former recovery was pleaded by defendant as an affirmative defense. (Tr. Record p. 4), and denied by plaintiff in his reply, (Tr. Record p. 5). The issue thus joined was decided in favor of plaintiff by the general finding.

Further, it appears from the testimony in the Bill of Exceptions, if the evidence is to be considered by this court in reviewing the 6th and 7th Assignments of Error, that plaintiff brought an action in the state court of Washington in 1914 for services rendered defendant in matters of general average and recovered therein the sum of $1,000, upon a

written instrument other than and separate from the instrument upon which the cause of action in the instant case is founded. Plaintiff in Error admitted at the trial that the recovery in the former suit was on the General Average bill, in evidence in the instance case as plaintiff's exhibit No. 20, and that this bill for $1,000 for General Average services was offered in evidence in the former suit to support the same. (Tr. Record p. 57.) And plaintiff in error contends in his opening brief, in the instance case, that defendant in error is suing in the instance case for services as an expert in assembling and classifying evidence in a trial involving the responsibility for collision damages to cargo. (Tr. Record p. 22, lnes 9-13.) It further appears from the testimony in the Bill of Exceptions that the General Average services involved matters occurring prior to the arrival of defendant's ship *Notre Dame d'Aror* on our Western Coast and the services in the instance case concerned matters occurring after that arrival. (Tr. Record p. 61.) The two services were rendered under different instruments, involved totally different matters, for each of which a separate account was kept and rendered, by plaintiff. (Tr. Record p. 60.)

In *Stark v. Starr,* 94 U. S. 477, it was said:

It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or

proof or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. But this princple does not require distinct causes of action, that is to say, distinct matters, each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together.

And in the Haytian Republic, 154 U. S. 118 at 125, the court, after quoting from *Stark v. Starr, supra,* as above, added:

The qualification states the elementary rule. One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would have established the other."

The record in the Bill of Exceptions shows that the testimony in the state case was in support of compensation for general average services and no other (Tr. Record p. 58,) under an instrument separate and distinct from the instrument in the instance case and for services on matters not involved in the instance case but arising long prior to

the matters involved in the instance case; while the testimony in the instance case would not support a claim for general average services at all. This is the test as declared in the Haytian Republic case, *supra.*

In view of the rule in *Stark v. Starr, supra,* and in the *Haytian Republic, supra,* and the facts of the instance case and of the state case, as disclosed by the bill of exceptions, we do not consider it necessary to discuss the authorities cited by plaintiff in error under his 5th Assignment of Error.

POINT V.

8th Assignment of Error.

Alleged error in the admission of testimony of plaintiff's witness Currie on the value of plaintiff's services, over objection of defendant on ground of incompetency, (Tr. Record p. 67. Pltff. in Error's Brief p. 22.)

This alleged error was duly raised and presented in the Bill of Exceptions.

Plaintiff in error admits, (Brief p. 22,) that this witness had shown considerable experience in shipping matters but contends that he had shown no experience whatever in the line of preparing such cases for trial.

We submit that the witness Currie's admitted "considerable experience" was sufficient to qualify

him to testify as to the reasonable value of plaintiff's services in the instance case.

The bare objection of defendant's counsel at the trial that the witness had not shown that he was engaged in or had any knowledge of similar cases and therefore had not shown himself qualified to answer the questions included in the 8th Assignment of Error, does not carry with it any conclusion that the witness had not properly qualified himself by his testimony. Statement of counsel to the effect that the witness had not qualified himself, in itself, of course, would carry no presumption in its favor. And this court cannot say from the bare question objected to, the objection, ruling, exception, and answer to the question, whether or not the witness was qualified and whether or not the ruling of the court was error.

If the whole evidence as contained in the Bill of Exception is to be considered by this court in reviewing this 8th Assignment of Error, then we submit that the admission of the testimony complained of was proper because the witness had shown himself qualified to express an opinion as to the value of plaintiff's services.

Further we submit, that if there was error, it was without prejudice to defendant; because of the fact that there was abundant testimony of competent witnesses on behalf of plaintiff to prove the value of plaintiff's services and support the finding and

judgment. See in Bill of Exceptions, testimony of Captain Copp, who fixed the value of those services at from five to six thousand dollars; (Tr. Record p. 47) testimony of Captain Stuart, who fixed that value at one thousand pounds, sterling, say $5000; (Tr. Record p. 48) Mr. Thorndyke, who fixed that value at five to six thousand dollars, (Tr. Record p. 53) the plaintiff, who fixed the value for the purposes of this case at $5000, (Tr. Record p. 41).

The witness Currie fixed the value, in his answer to the question objected to, at from six to seven thousand dollars. The court awarded the sum of $4,000.

The excepting party must make it manifest that an error prejudicial to him has occurred in the trial in order to justify an appelate court disturbing the general finding.

Cunningham v. Springer, 204 U. S. 647, 652.

The burden of showing prejudicial error is upon the plaintiff in error and no such showing has been made. On the contrary we submit that it is affirmatively shown by the record that the admission of the testimony objected to was without prejudice, to the defendant.

POINT VI.

9th Assignment of Error.

Alleged error in the admission of testimony of plaintiff as to relative values of like service in

England and in British Columbia and Seattle. (Tr. Record pp. 51 and 67. Pltff. in Error's Brief, p. 22).

This alleged error was duly raised and presented in the Bill of Exceptions.

A witness for plaintiff was asked what was the relative value of like service in England and British Columbia and Seattle and testified the value was much higher here than in England, at a ratio of two and one half to one. (Tr. Record p. 51).

The burden is on the excepting party to show prejudicial error.

Cunningham v. Springer, 204 U. S. 647, 652.

That burden the plaintiff in error has not discharged.

We submit that if there was error, it was without prejudice to plaintiff in error. There was nothing before the court, as disclosed by the record of the testimony in the Bill of Exceptions, showing what would have been charged for similar service in England and the fact that such services here were worth two and one-half times more than in England could in no way fix the value here, without a criterion which was wanting.

Furthermore, the court awarded plaintiff $4000 as against $6000. to $7000. testified to by this witness as the value of the services rendered.

POINT VII.

10th Assignment of Error.

Alleged error in admitting bill of broker in London for services rendered on collision, plaintiff's exhibit No. 21. (Tr. Record pp. 52 and 68; Pltff. in Error's Brief p. 22.)

This alleged error was duly raised and presented in the Bill of Exceptions.

What was said in Point VI as to the 9th Assignment of Error, may be considered as repeated here as to the 10th Assignment of Error.

The amount of the bill of the London agent had no bearing upon the value of plaintiff's services at Seattle and British Columbia and its admission was without prejudice to plaintiff in error. The trial court itself characterized it as "rather far fetched." (Bill of Exceptions, Tr. Record p. 5, line 14.)

That bill, plaintiff's exhibit No. 21, was for services during a period of four months and was for £400 or say $2000. Notwithstanding the comparison made between values of services here and in England, as two and one half times greater here than in England, the court as a mater of fact found for plaintiff in the sum of $4000 for services covering a period of over one year and eight months; plaintiff testified that the time actually occupied by him,

if boiled down, would amount to one year, of eight hours a day. (Tr. Record p. 39, lines 9-14) Plaintiff further testified that his net earnings were three to four thousand dollars a year. (Tr. Record p. 42). It is evident that it was this testimony as to time actually employed and the earning ca-formed the basis of the court's finding in favor of pacity of plaintiff at Seattle, that formed the basis of the court's finding in favor of plaintiff in the sum of $4000, and not the testimony of Currie as to relative values or the London agent's bill of Exhibit No. 21, and that the admission of the agent's bill was without prejudice to plaintiff in error.

As applicable generally to the 8th, 9th and 10th Assignments of Error, the admission of alleged incompetent and immaterial evidence, the Supreme Court in *Holmes v. Goldsmith*, 147 U. S. 150, said:

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

To the same effect, *Press Pub. Co. v. Monteith*, 180 Fed. 356 at 362, 2nd C. C. A.

This court in *U. S. v. Honolulu Plantation Co.*, 122 Fed. at 583, said:

"Material evidence erroneously admitted in a trial before a *jury* is always reversible error, unless it can be properly said that such admission was without doubt, without injury."

The erorneous admission of evidence was harmless where the same facts were shown by proper evidence.

Smith v. Township of Au Gres, 150 Fed. 257.

Crichfield v. Julia, 147 Fed. 25.

The error, if any, in admitting evidence of a fact established by evidence received without objection, is harmless.

St. Louis, etc. Co. v. Duke, 192 Fed. 306.

Unless it can be shown that prejudice has resulted from error of the trial court prejudice will not be presumed.

Hoogendorn v. Daniel, 202 Fed. 431 9th C. C. A.

In the case at bar the trial was *to the court* and it can hardly be said that opinion evidence by a witness, as to the value of services, is prejudicial, because of incompetency of the witness, where the trial judge was advised as to the degree of qualification of the witness; or where other expert witnesses, whose testimony on the question of value of

service was received without objection, testified as to the value of those services in an amount in excess of the award made by the court.

POINT VIII.

11th and 18th Assignments of Error.

Alleged error in the admission of evidence for defendant in error detailing the evidence offered in former suit in support of his cause of action in that suit and to the effect that in the former suit he did not sue for the services sued for in the instance suit. (Tr. Record pp. 58, 59, 60, 61, 62, 63, 68, 69, 70. Pltff. in Error's Brief p. 22.)

It will be remembered that one of the affirmative defenses of plaintiff in error in the instance case was former recovery which was denied by defendant in error. The issue thus joined was decided in favor of defendant in error by the general finding.

It appears from the testimony contained in the Bill of Exceptions that, in support of that affirmative defense, plaintiff in error offered in evidence Exhibit A, being the complaint, answer, reply, findings of fact, conclusions of law and judgment in the former suit and it was admitted that the judgment was paid in full; and that in rebuttal the defendant in error took the witness stand and testified respecting the former suit, identified Exhibit

No. 22 as the account on which he recovered in that former suit, (Tr. Record p. 56), the basis of his complaint and recovery in the former suit, (Tr. Record p. 57); that plaintiff in error admitted as a fact that the recovery in the former suit was on the general average bill, Exhibit No. 22 herein, and that that was the bill evidence was offered in the former suit to support, (Tr. Record p. 57); defendant in error further testified that he was present at the trial of former suit and was the main witness for plaintiff in that suit; that he alone had knowledge of the particular facts upon which recovery could be had, (Tr. Record p. 58); that Exhibit No. 23 is the letter containing instructions from plaintiff in error to defendant in error to take charge of the general average matters. (Tr. Record p. 59;) that separate and distinct accounts of the services in the general average matter, the basis of recovery in the former suit, and of services involved in the instance case were kept and rendered by defendant in error, (Tr. Record p. 60;) and that "the general average agency services referred to are facts occurring prior to the arrival of the ship in Seattle and the matters I testified to this morning and afternoon (in the instance case), for which I am now claiming compensation are for services rendered subsequent to the arrival of the vessel at Seattle and concern matters occurring after the arrival of the vessel, that is the line of demarcation." (Tr. Record p. 61).

In view of the issues raised by the pleadings on the question of former recovery, the testimony of the defendant in error which was sought by the questions, objections to which form the bases of Assignments of Error 11th to 17th, inclusive, was competent and material.

There was no other way of determining the issues in the instance case regarding the defense of former recovery than by calling witnesses who attended the trial of the former suit. If the testimony of such witness in the instance case was inaccurate or untrue, plaintiff in error, on its rebuttal, could have shown such inaccuracy or untruth. That such could not be shown is manifest from the admission by plaintiff in error that the recovery in the former suit was on the bill of $1000 for general average services and that the bill offered in evidence in the instance case as Exhibit No. 22 was the bill offered in evidence to support the cause of action in the former suit. (Tr. Record p. 57.)

While on the other hand, it is contended by plaintiff in error in his brief that in the instance case defendant in error is suing for services as an expert in assembling and classifying evidence in a trial involving the responsibility for collision damages to cargo. (Pltff. in Error's Brief, p. 22.)

The test laid down in *Stark v. Starr, supra,* and the *Haytian Republic, supra,* for the purpose of determining whether or not the causes of action in the

former suit and in the instance case should have been joined in one suit, i. e. whether the evidence necessary to prove one cause of action would have established the other, determines the admissibility of the testimony as material and competent, which admission is objected to and urged as error by the Assignments of Error, 11th to 17th inclusive.

As to the 18th Assignment of Error, the objection complained of is only to the first ten lines of the testimony of witness Gorham. (Tr. Record p. 63). There is nothing in those ten lines which is in any way prejudicial to plaintiff in error. The balance of the testimony of that witness on pages 63 and on page 64, all within the Bill of Exceptions was not objected to and no error can be predicated upon testimony not admitted over an objection. Plaintiff in Error may have intended that his objection should cover all of the statement of this witness but the record does not disclose any such intention.

We submit that the objections to the several questions in the 11th to the 17th Assignments of Error and to the testimony in the 18th Assignment of Error, were not well taken, that the rulings of the court overruling the objections were without error and that, even if there were error, such error was not prejudicial to plaintiff in error.

The burden is on the excepting party to show prejudicial error.

Cunningham v. Springer, 204 U. S. 647, 652.

The plaintiff in error has not discharged that burden.

Admission of extrinsic evidence to show precise matters raised and determined in former suit:

In the instance case the complaint alleges, paragraph III, that between November 29, 1910 and June 6, 1912, in the State of Washington and the Province of British Columbia, plaintiff rendered services as a ship's agent to defendant at its special instance and request in writing.

The answer to that complaint alleges, in its first affirmative defense: (1) That on October 22nd, 1914, plaintiff began an action in the Superior Court of King County, State of Washington, against defendant for the same cause of action, the same services and upon the same contract pleaded herein and covering the same transactions; in which former action defendant appeared, issue was joined, trial had and judgment entered in favor of plaintiff in the sum of $1081 and costs and judgment was thereafter paid in full (par. I;) (2) That in order to sustain his cause of action in the state court plaintiff offered evidence of the same transactions as are referred to and relied upon herein and in plaintiff's bill of particulars herein, and that all matters mentioned in plaintiff's complaint herein and in his bill of particulars herein, were litigated and should have been litigated in the former suit (par. II);

The plaintiff in its reply made a general denial of the allegations of that first affirmative defense.

Thus the issues were joined.

It was the duty of the court to admit testimony on these issues.

At the trial, in support of its first affirmative defense, defendant offered in evidence the complaint, answer, reply, findings of fact, conclusions of law and judgment in the former suit, defendant's Exhibit A; and it was admitted that that judgment had been paid.

This complaint and the findings of fact in the former suit, alleges and recites, respectively: That between the 11th day of November, 1910, and the 5th day of January 1914, at Seattle, Washington, and Vancouver, British Columbia, plaintiff rendered services as a ship broker to defendant at its special instance and request in writing.

No further evidence was offered on the part of defendant in support of its first affirmative defense.

Thereupon the plaintiff in rebuttal, in view of the issues of fact joined by the first affirmative defense and the reply, offered testimony showing: (1) That the services involved in the instance case were not the same services as were involved in the former suit, (2) nor upon the same contract; (3) nor covering the same transactions; (4) that the evidence of-

fered by plaintiff in the former suit was not of the same transactions as are referred to and relied upon in the instance case and in his bill of particulars in the instance case; (5) that the matters mentioned in plaintiff's complaint in the instance case and in his bill of particulars in the instance case were not litigated in the former suit.

Part of the evidence so offered by plaintiff was objected to by defendant, its objections overruled and exceptions thereto properly preserved and presented in the Bill of Exceptions under the 11th to the 18th Specifications of Error.

We submit that upon the face of the complaint in the instance case and of the complaint in the former suit, without respect to any distinction as to the phrases "ship broker" and "ship's agent," the causes of action respectively stated therein, are not the same; and for that reason the judgment in the former suit is no bar to recovery herein.

But in view of the issues tendered, in view of the very particularity of the allegations of both the first and second paragraphs of the first affirmative defense in defendant's answer, denied by plaintiff's reply, we submit that it was proper for the trial court to admit extrinsic evidence on the part of plaintiff on such issues.

Where former recovery is pleaded, it can be shown in the second suit by parol evidence what was

tried in the first, whenever it becomes necessary to do so.

Campbell v. Rankin, 98 U. S. 261.

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit."

Russell v. Place, 94 U. S. 606.

The case of *Russell v. Place, supra,* was followed by this court in *Lim Jew v. U. S.,* 196 Fed. 736, wherein it was said:

"It is also settled law that a judgment upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties; but to have this operation it must appear from the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. Any uncertainty on this head must be dispelled by extrinsic proof; otherwise the entire subject-matter of the action will be set at large upon the new contention."

The issues tendered by the first affirmative defense of the answer and met by denial in the reply, raise such an "uncertainty" in the case at bar.

The admission of the testimony objected to, covered by the 11th to the 18th Assignments of Error, even if error, was without prejudice to plaintiff because there was sufficient other evidence, not objected to or if objected to, exceptions not taken in Bill of Exceptions, admitted to support the issues on the question at bar in favor of plaintiff.

St. Louis, etc., Co. v. Duke, supra.

We submit that the judgment of the lower court should be affirmed.

WILLIAM H. GORHAM,

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